Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From January 1, 1960

Through March 31, 1960

VOLUME 98

MacDONALD GALLION, Attorney General

1961

QUARTERLY REPORT

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Volume No. 98

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1960, through March 31, 1960, is published in compliance with the provisions of Title 55, Section 228 Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief eecutive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION
Attorney General

MacDONALD GALLION, Attorney General

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Administrative Assistant

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OPINIONS

January 11, 1960

Honorable John C. Curry
Superintendent of Banks
Department of Banking
CAPITOL

Banks and Banking—Licenses—Loans.

Applications for license under Alabama Small Loan Act discussed generally.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of December 11, 1959, is as follows:

"In re: Act No. 374 approved November 6, 1959, and described as 'Alabama Small Loan Act'

"In anticipation of the above Act becoming effective January 5, 1960, a number of questions have been raised with reference to those provisions providing for application for and issuance of the first licenses under said Act.

"Section 21 of the Act provides: 'Any person having a license under Act No. 159, H. 233, approved June 23, 1945 (General Acts of Alabama 1945, page 200), as amended, in force when this Act becomes effective, or had such a license in effect on September 30, 1959, shall be deemed to have a license under this Act for a period expiring six months after the effective date hereof, if not sooner revoked.'

"Since the 'six months after the effective date hereof' will expire July 5, 1960, or approximately three months prior to the end of the fiscal year covered by the licenses issued under provisions of the 1945 Act (No. 159 approved June 23, 1945) and since the 1959 Act makes no provision for a credit on the new license of the unused portion of the 1959-60 license fee, several important questions have been raised as to the proper charges to be made of an applicant who files an application for a license as provided by Section 4 of the 1959 Act during the six months' period between January 5, 1960, and July 5, 1960, for the purpose of being licensed for the remainder of the fiscal year ending September 30, 1960.

"1. Does a person who has a license under Act No. 159, approved June 23, 1945, in force on January 5, 1960, or had such a license in effect on September 30, 1959, have to pay the investigation fee of $100.00 if he applies for a license under Section 4 of the 1959 Act at any time during the six months period ending July 5, 1960, when he 'shall be deemed to have a license under this Act?'

"That part of Section 4 of the 1959 Act providing for the issuance of a license on a half year basis, that is for $100.00 fee, is as follows: 'If any applicant licensed under this Act for the first time shall commence business after the first day of April in any year, the amount of the license shall be one-half of the amount of a full year's license.' (Underscoring ours)

"2. Does the person described in Question 1 above have to pay a license fee of $200.00 if he applies for a license under Section 4 of the 1959 Act if his application is filed after April 1, 1960, but before July 5, 1960?

"3. Can it be construed that the filing of such application between April 1 and July 5, 1960, by such an applicant is an 'applicant licensed under this Act for the first time' and one who 'shall commence business after the first day of April'?"

My answer to your first question is in the affirmative.

Section 4 of Act No. 374, Acts of Alabama 1959, approved November 6, 1959, in referring to application for a license states:

". . . At the time of making such application, the applicant shall pay to the supervisor the sum of one hundred dollars ($100) as a fee for investigating the application . . . . ."

And Act No. 374, supra, contains no exempting clause as to payment of said investigation fee.

My answer to your third question is in the affirmative.

Section 4 of Act No. 374, supra, provides:

". . . If any applicant licensed under this Act for the first time shall commence business after the first day of April in any year, the amount of the license shall be one-half of the amount of a full year's license. . . ."

In my opinion, any applicant for a license under this Act is an applicant licensed under this Act for the first time as there has been no prior license issued under the Alabama Small Loan Act.

My answer to your second question is, therefore, in the negative.

Very truly yours,

MacDONALD GALLION
Attorney General

January 12, 1960

Hon. Roy M. Greene
Acting County Attorney
Russell County
Phenix City, Alabama

Pensions and Security, Department of—Counties.

Counties not authorized to make appropriations to county boards of pensions and security for travel expenses incurred by members of such boards.

Opinion by Assistant Atorney General Cage.

Dear Sir:

Your request for an official opinion is as follows:

"At a recent Commission meeting I was requested to investigate the possibility of the County Commission appropriating a sum of money to the local Pensions and Security Board for the purpose of attending meetings, both on local and state level, and to cover traveling expenses in conjunction with Board investigations.

"While I find no law authorizing such an appropriation neither can I find a law that would be against such an appropriation."

Section 10 of Act No. 703, Acts of 1951, page 1211, provides that the governing body of any county shall have the power and be authorized to make certain described appropriations for welfare purposes not here pertinent and "to make other and further provision for the care of the poor and needy of the county. . . ." I know of no other provision of law which would tend to authorize the type appropriation of which you inquire. Such appropriation must, therefore, if it could be made at all, be under the provision of Act No. 703 authorizing the county to make other and further provision for the care of the poor and needy of the county.

Section 7 of said Act No. 703, establishing the county boards of pensions and security mentioned in your inquiry, provides that members of such board "shall serve without compensation for their services as members, but shall be reimbursed for the amount of their traveling and other expenses actually paid out while in attendance at the meetings of the county board or on business of the department." Similar provisions are made in Section 3 of the Act for the reimbursement to members of the state board of pensions and security for traveling and other expenses paid out while in attendance at the meetings of the state board or on business of the state department.

Since express provision has been made for the reimbursement of expenses incurred by members of a county board of pensions and security while in attendance at the meetings of the county board or on business of the department, it is my opinion that payment of such expenses is not within the contemplation of "other and further provisions for the care of the poor and needy of the county" as provided in Section 10 of Act No. 703, Acts of 1951, page 1211, and that said section of said act does not authorize a county governing body to appropriate funds out of the public funds of the county for such purpose. As mentioned above, I know of no other provision of law that would tend to authorize such an appropriation.

Very truly yours,

MacDONALD GALLION
Attorney General

January 14, 1960

Honorable Bradley Brown
Director
Department of Revenue
Jefferson County
Birmingham, Alabama

Driver's License—Permits—Birth Certificates

Judge of Probate or Commissioner of License not required to retain certified copy of birth certificate filed by the applicant under Act No. 346, General and Local Acts 1959.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion, bearing date of January 11, 1960, is as follows:

"In performing the duties as required under Act No. 346, approved November 2, 1959, of issuing temporary driving permits to persons fifteen years of age, we are experiencing considerable dissatisfaction particularly on the part of parents of these fifteen year olds, who strenuously object to the surrendering of the birth certificate which we required after the effective date of this act based on the wording in sub-section (b) of Section 1, ". . . and the age of the applicant must be substantiated by the applicant filing with the judge of probate a certified copy of his or her birth certificate.' I understand that the resistance to surrendering the birth certificate is even more unpleasant with many of the probate judges over the state than it is in this office because it is more difficult to obtain a birth certificate, or a certified copy thereof, in the more sparsely populated counties.

"After talking to some of the probate judges regarding this problem and in further study of the language of the act, I have concluded, based on the many definitions of the word 'filing' and other information at hand, that the Legislature did not intend for those of us charged with the issuing of these permits to require the applicant to surrender this certificate. If they had I believe the word 'surrendering' would have been used in the act rather than the word 'filing.' I would therefore appreciate your official opinion on the following:

"Would we be properly discharging our responsibility under this act if we required the applicant to present a birth certificate or certified copy to us, and we noted on the permit and the copies thereof the birthdate of the applicant?

"The Highway Patrol before giving an examination to these applicants requires the person applying to present a birth certificate or certified copy thereof, and the application, which is certified and which becomes a record at the Department of Public Safety in Montgomery, reflects in addition to other information the birth certificate number or other pertinent information."

Section 1(b) of Act No. 346, General and Local Acts of Alabama 1959, approved November 2, 1959, provides that ". . . the age of the applicant must be substantiated by the applicant filing with the judge of probate a certified copy of his or her birth certificate. . . . . ."

The act contains no provision requiring the probate judge to keep the tendered certified copy of such birth certificate nor does the Code of Alabama set this out under his duties.

The legislative intent clearly was to have some undisputed record of the child's age exhibited to the probate judge when application was made for a temporary driving permit, so that the date of applicant's birth could be verified therefrom. When that date of birth is noted on the permit and copies thereof, your responsibility would be properly discharged.

In my opinion, the answer to your question is in the affirmative.

Very truly yours,

MacDONALD GALLION
Attorney General

January 15, 1960

Honorable Joel Robinson
Solicitor, Walker County
Jasper, Alabama

Costs and Fees—Constables—Justices of the Peace.

1. Under the provisions of Title 11, Section 92, Code of Alabama 1940 a constable would be entitled to an allowance of ten cents (10c) per mile for each mile necessarily traveled by him in carrying a person before a magistrate under a warrant of arrest, or to jail when committed thereto, to include his travel both to and from the place of appearance or confinement of the defendant.

2. If a defendant is sentenced to jail for non-payment of a fine, or otherwise, the justice may issue execution to collect from a solvent defendant the costs due the justice and the constable. If the defendant is insolvent the justice and the constable may receive the fees due them under the provisions of Title 13, Section 418, Code of Alabama 1940, subject to the limited application of such statute.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of October 26, 1959, is as follows:

"Under Title 11, Section 92 a constable is authorized a fee of ten cents (10c) per mile for carrying a person before a magistrate under a warrant of arrest or to jail when committed thereto. A dispute has arisen in this county concerning the compensation of such mileage and I am requesting the following information:

"Is the constable authorized the fee of ten cents per mile for a round trip or for one way trip?

"A second situation which I would like to have clarified arises under Sections 93 and 97 wherein the case is not taken to the Circuit Court by appeal or otherwise, and the defendant having been convicted is sentenced to jail for the fine and cost. Who and from what fund would the cost accruing to the Justice of the Peace and the Constable be paid."

To answer your first inquiry I would advise that, in my opinion, a constable who carries a person before a magistrate under a warrant of arrest, or to jail when committed thereto, should be compensated at the rate of ten cents per mile for each mile necessarily traveled by him in performing this duty of his office. To me this would mean that such person would be entitled to his mileage allowance both for traveling to and from the point of appearance or confinement of the person arrested or confined.

I reach this conclusion for several reasons. Although the particular portion of Section 92, supra, here considered is not perfectly clear on this point, I believe the term "for each mile" means each mile which the constable necessarily travels in performing this duty. I feel, too, that some consideration should be given to the fact that a sheriff receives his mileage allowance upon the basis of travel both to and from the point of arrest of a person apprehended by him and upon the same basis when called upon to remove a prisoner to another jail or county. This, coupled with the fact that the next succeeding provision of Section 92, supra, provides that the constable is to be compensated on the same basis as is the sheriff for similar services, leads me to the conclusion that it would be reasonable to say that the constable should receive his mileage allowance on the basis of miles traveled in performing his duty and not necessarily upon the basis of a one-way trip to the place of appearance or confinement of the defendant.

I am not clear as to the question presented by your second inquiry in view of the fact that I do not feel that a justice of the peace is privileged to sentence one to jail for the non-payment of costs. Such a prohibition is found in Title 13, Section 384, Code of Alabama 1940 which states that it shall not be lawful for any justice of the peace, or notary public with the powers of a justice of the peace, to sentence any person to hard labor for the non-payment of costs. However, I know of nothing to prevent a justice of the peace from sentencing a defendant to jail for failure to pay a fine or to otherwise impose a jail sentence in conformity with the jurisdiction of the justice. As I understand your inquiry, you wish to know the manner in which the justice of the peace and the constable are to receive their fees under such conditions.

It is my opinion that under such conditions, if the defendant concerned is not insolvent, the justice of the peace should issue an execution under the authority of Title 11, Section 97, supra, for such costs and collect same

in this manner. If the person sentenced to jail as a result of failure to pay the fine imposed is proven to be insolvent the justice of the peace, under certain conditions, may act under the authority of Title 13, Section 418, Code of Alabama 1940, to deduct his costs and fees and those of the constable from other fines and forfeitures collected by him. Section 418, supra, provides that he may deduct from fines and forfeitures collected by him the amount due for his fees and those of the constable in cases in which the defendants were acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars ($50.00) for any calendar month.

I should caution that such statute does not have application to offenses involving our highway laws nor our game and fish laws and perhaps other, when specific disposition is made by statute of the fines and forfeitures collected. However, subjected to the limitations of this statute, a justice would be permitted to withhold his fees and those of the constable if the defendant so confined is proven to be insolvent. If not insolvent, then execution should issue against him for the costs of the justice and the constable, as noted above.

Very truly yours,

MacDONALD GALLION
Attorney General

January 15, 1960

Honorable S. K. Adams
Judge of Probate
Dale County
Ozark, Alabama

Schools—Counties—Words and Phrases.

1. Under the authority of Title 52, Section 207, Code of Alabama 1940, the county governing body is authorized to make an appropriation of county funds for the purpose of purchasing a site upon which a public school of the county is to be located, such being considered as "support of the public schools" of the county.

2. Opinion found in Biennial Report of Attorney General, 1930-32, page 507, and all other opinions of this office in conflict herewith are hereby modified to conform to this opinion.

Opinion of Assistant Attorney General Hardin.

Dear Sir:

Your letter of December 23, 1959 is as follows:

"I would appreciate your legal opinion on the following question:

"Can a county legally spend money from the general fund to pay for land for the county education department to build a school, this school is to be financed by Federal and State funds?"

In addition, in our telephone conversation of January 12, you have advised that the school mentioned by your letter is a high school which is to be constructed in the Fort Rucker area in which both the Federal Government and the State of Alabama will participate in the cost of construction. You further advise that the County Board of Education has requested of the county governing body that Dale Conty assist in the purchase of the site upon which such high school is to be situated. I understand that the Federal Government is participating in the construction of this school by reason of the density of armed forces personnel in this particular area and that the State proposes to participate with revenue resulting from the recently approved bond issue for school construction.

After full consideration of your question, I am of the opinion that your county governing body, if it so desires and is financially able, may participate in the purchase of the site on which this school is to be erected. I feel that your authority in this regard stems from the provisions of Title 52, Section 207, Code of Alabama 1940. This particular statute is as follows:

"Appropriation of funds out of county treasury.—The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the support of the public schools within said county."

To answer your question consideration must be given to the meaning of the phrase ". . . for the support of the public schools in said county . . ." Although an opinion of this office found in Biennial Report of Attorney General, 1930-32, page 507, seems to conclude, among other things, that the above section would not have application to other than already existing and operating institutions, I do not feel that such a limited construction is proper. I, also, feel that more recent opinions of this office, culminating with those found in Quarterly Reports of Attorney General, Volume 40, page 9 and Volume 42, page 50, seem to indicate that such a restrictive construction should not be placed upon this statute. These opinions have approved cer-

tain appropriations for repair, construction and improvement of school facilities, and to me seem to indicate that it would be only proper to further conclude that the term "support of the public schools" would include within its meaning the authority to acquire suitable sites or locations or other property, upon which schools or school facilities are to be located. Such interpretation was given to this statute in a recent opinion rendered to the Board of Revenue of Montgomery County, under date of December 18, 1959, relative to the acquisition by the county of a site for proposed area trade school.

It is my opinion that this latter interpretation is correct and that the above statute does authorize the county governing body, subject to its approval and financial ability, to make an appropriation to participate in the purchase of the site for the proposed high school. The former opinion of this office mentioned above which seems to be in conflict with the view here expressed is hereby modified to conform with this latter opinion.

Trusting to have been of service, I am,

Very truly yours,

MacDONALD GALLION
Attorney General

January 22, 1960

Honorable Arthur E. Gamble, Jr.
Solicitor, Second Judicial Circuit
Butler County
Greenville, Alabama

License Tags—Motor Vehicles.

1. Where an automobile is owned by an individual (as distinguished from a firm, corporation or association) under the provisions of Title 51, Sections 693 and 704, as amended, Code of Alabama 1940, the license is to be paid and the license tags purchased in the county in this State where the owner of the vehicle resides.

2. The fact that the owner of the vehicle, as so licensed and registered, lends the vehicle to a student who temporarily keeps and uses the vehicle in another county, while attending college in such county, would not require that the vehicle be licensed and registered in that county.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1959, is as follows:

"I write you this letter to ask your opinion based on the following set of facts.

"There are a number of parents who live in Butler County, who have children enrolled in the University of Alabama Medical School in Birmingham, Alabama. The parents own automobiles which they have let the children take to school. The title to the cars remain in the parents. The parents have bought the proper tags for the cars in Butler County.

After the cars were taken to Birmingham the children or the parents have been required to buy another tag for the car in Jefferson County. None of the children are in Jefferson County for any purpose other than to attend school. None of them are permanent residents of Jefferson County. One or more may have part time jobs there while in school.

"Please give me your opinion as to the proper place for purchase of tags for these cars. Can these children or their parents be required to buy another tag in Jefferson County? Would the same apply to students at Tuscaloosa or Auburn?

Title 51, Section 704, as amended, Code of Alabama 1940, provides that the ad valorem tax on motor vehicles shall be paid where owned by an individual (as distinguished from a firm, corporation or association), in the county "where the owner resides." It has also been generally accepted under the same Code Section, as well as under the provisions of Title 51, Section 693, as amended, Code of Alabama 1940, that where a car is owned by an individual (as distinguished from a firm, corporation or association) that the license fees are due to be paid, and the license plates required to be purchased, in the same county. That is, the county in this state where the owner of the car resides.

It is, therefore, my opinion that the license and registration fees under Section 693, as amended, supra, in the specific cases described by you are required to be paid, and the tags purchased, in the county where the (parent) owner of the vehicle resides. If they are so paid then no further license or registration fees would be due, even though the motor vehicles involved have been loaned by the owners to students who temporarily keep and use them in another county in this state where they are attending college. Moreover, the fact that some of the students accept part time jobs while attending the colleges involved, would not change the conclusion that

the owner of these vehicles would not be required to purchase license tags in the counties where these vehicles are being kept and used, under the circumstances, by the students.

Please remember, however, that this opinion is confined to the specific facts presented by you.

Very truly yours,

MacDONALD GALLION
Attorney General

January 25, 1960

Honorable L. R. Driggers
City Clerk-Treasurer
City of Dothan
Dothan, Alabama

Licenses.

1. The license under Title 51, Section 474, Code of Alabama 1940, applies only to bicycles, and not to tricycles having three permanent wheels.

2. The so-called sidewalk bicycle which fundamentally has two wheels, but which has a removable two wheel attachment which is used in the case of beginners, is actually a small bicycle, within the contemplation of Section 474, supra.

Opinion by Assistant Attorney Burton.

Dear Sir:

Your request for an official opinion under date of December 15, 1959 is as follows:

"In reviewing our City License Code, the City Commission would like to know whether children's three wheel tricycles and the sidewalk bikes which operate the same as tricycles (see pictures enclosed) manufactured by one of our Dothan industries, are subject to the State license required under Title 51, Section 474, Code of Alabama, as amended."

Title 51, Section 474, Code of Alabama 1940, provides in material part, as follows:

"Each person other than a licensee under Section 462 of this title engaging in the business of dealing in, renting, or hiring, bicycles or motorcycles shall pay the following license: . . . . ."

Your question is confined to whether tricycles and the so-called sidewalk bicycles which have a removable two wheel attachment are to be considered as bicycles under the provisions of Section 474, supra, for the purpose of the license tax levied thereby.

Webster's New International Dictionary, Second Edition, page 264 defines a bicycle as a light vehicle having two wheels, one behind the other.

Other standard dictionaries contain practically the same definition. On the other hand, the same dictionaries define and distinguish a tricycle as a three-wheeled vehicle.

This being considered, I am of the opinion that the tricycles and other contraptions which do have three permanent wheels are not "bicycles," as that term is used in said license statute, and that one who deals in same is not in the business of selling or renting "bicycles," or subject to the license tax therefor.

This would also particularly appear to be true, as the established rule is that where there is a doubt as to the construction of a taxing statute insofar as it relates to coverage, that such doubt is to be resolved in favor of the taxpayer.

State v. Roden Coal Company, 197 Ala. 407, 73 So. 5

Dixie Coaches v. Ramsden, 238 Ala. 285, 190 So. 92

Gotlieb v. City of Birmingham, 243 Ala. 579, 11 So. 2d 363, 364

The so-called sidewalk bicycles presents a different situation. The brochure which you have furnished appears to clearly indicate that such a contraption is fundamentally a bicycle, and meets the definition of a bicycle as it is defined in the dictionaries as well as the general conception of what a bicycle is thought to be. It is true that the so-called sidewalk bicycle does have a two wheel attachment which can be used in the case of beginners learning to ride the bicycle. But, it is also clear that this attachment does not have to be used, and probably is not used after a child learns to control the vehicle and ride the bicycle without the use of the attachment.

It is also my understanding that the two wheel attachment is removable or can be folded so that the so-called sidewalk bicycle can readily be operated on two wheels like an ordinary bicycle.

In similar cases, it has been the practice to look to the fundamental nature and structure of the machine or device under consideration to ascertain its true nature. Applying this test, after considering the definition and general conception of a bicycle, I am of the opinion that the so-called sidewalk bicycle, regardless of the removable two wheels attachment, is fundamentally and actually a small bicycle. Thus, the dealer in same is required to pay the bicycle license tax. I might also add in this connection that the State Department of Revenue has for several years interpreted and construed Section 474, supra, to apply to these so-called sidewalk bicycles.

Very truly yours,

MacDONALD GALLION
Attorney General

January 25, 1960

Honorable W. R. Draughon
Clerk, Circuit Court
Geneva County
Geneva, Alabama

Costs and Fees—Clerks of Circuit Courts—Convicts—Comptroller—Pardon, Parole and Probation.

When a defendant is sentenced to the penitentiary or to hard labor for costs, those fees specifically enumerated in Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 542, Acts of Alabama 1957, page 762, are payable by the State under the provisions of Act No. 558, Acts of Alabama 1957, page 777, when submitted in accordance with Title 45, Section 72, as amended by Act No. 60, Acts of Alabama 1957, page 100, whether the defendant serves said sentence or is granted probation.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your request for an official opinion, as Clerk of the Inferior Court of Geneva County, Alabama, bearing date of January 9, 1960, in which you present the following:

"(1) If a defendant is convicted of a misdemeanor in the Inferior Court

of Geneva County, such County having a County Solicitor who is not paid a salary by the State of Alabama, and such misdemeanor is one which requires that a solicitor's fee be taxed against the defendant as a proper item of cost, and such defendant is sentenced by the presiding judge to the county jail or to hard labor for the County for failure to pay the fine and costs, and the court clerk prepares and transmits to the comptroller a cost bill in compliance with Title 45, Section 72, 1940 Code of Alabama, as amended, and the presiding judge certifies that such defendant has been committed to the county jail or placed on probation, is it the duty of the comptroller to cause to be paid to the court clerk, the clerk's fees, sheriff's fees, state witness fees and the solicitor's fees?"

I am of the opinion that all parts of your inquiry should be answered in the affirmative as to those fees specifically enumerated in Title 45, Section 69, Code of Alabama 1940, as last amended by Act No. 542, Acts of Alabama 1957, page 762, provided that the defendant is properly sentenced to hard labor for the county to pay the costs.

In an opinion of this office rendered to Hon. L. D. Wall, Sheriff of Madison County, dated May 12, 1959 (Ms), it was held that when a prisoner was sentenced to the penitentiary or to hard labor for costs, a sheriff would be entitled to collect a $2.00 fee from the State for committing prisoners to jail pursuant to the provisions of Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 542, Acts of Alabama 1957, page 762. In said opinion it was observed:

"Act No. 542, supra, uses the word 'penitentiary.' However, the obvious intent of the Legislature when this Act is taken in pari materia with Act No. 61, Acts of Alabama 1957, page 100, was to include county hard labor convictions, as well as penitentiary convictions.

* * * * * *

"It is, therefore, my opinion that your . . . . . fee would be submitted to the State Comptroller (See Act No. 558, Acts of Alabama 1957) in the bill of costs pursuant to the provisions of Act No. 542, supra."

The provisions of Title 45, Section 72, Code of Alabama 1940, as amended by Act No. 60, Acts of Alabama 1957, page 100, should be followed in presenting the cost bills to the State.

In my opinion, the above is likewise applicable to all the fees specifically enumerated in Act No. 542, supra.

Your attention is invited to an opinion of this office rendered to Hon. W. H. Quillan, Judge Law and Equity Court, Franklin County, dated October 8, 1957 (Quarterly Report of Attorney General, Vol. 89, page 10), which holds that there is no authority for sentencing a defendant to the county

jail to pay costs, but that the sentence must be to hard labor for the county for failure to pay costs or confess judgment therefor.—Title 15, Section 342, Code of Alabama 1940.

What has heretofore been said above is applicable to cases in which a defendant is sentenced in accordance therewith, but granted probation.—Quarterly Report of Attorney General, Vol. 17, page 87.

Very truly yours,

MacDONALD GALLION
Attorney General

February 4, 1960

Honorable Brunner Nix
Sheriff, Walker County
Jasper, Alabama

Costs and Fees—Counties—Sheriffs.

If a sheriff, or his deputy, is required to remove a person from another county under warrant of arrest issuing in a peace proceeding such officer may not make claim on the county for the cost of such removal but same must be taxed and collected under the provisions of Title 15, Sections 407 and 412, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an opinion under date of November 24, 1959 is as follows:

"When it is necessary for my officers to go out of county to pick up a person on a Peace Proceeding warrant, am I entitled to receive a removal fee from the County Board of Finance and Control."

In my opinion your inquiry must be answered in the negative.

The procedure relating to peace proceedings such as mentioned by your letter is set out in Title 15, Sections 401-421, Code of Alabama 1940.

These statutes prescribe the means by which one may make affidavit as to any threatened offense against him or his property and the further manner by which such breach of the peace may be restrained under the provisions of these statutes. As regards the costs of any such proceedings it is provided by Section 407, supra, that:

> "If the magistrate regards the complaint as unfounded, or frivolous, he may order the complainant to pay the costs of prosecution; and, upon making such order, an execution may issue to enforce the payment thereof."

It is further prescribed by Section 412, supra, that:

> "In all cases where a person is required to keep the peace, the magistrate may order the costs of the prosecution or any part thereof, to be paid by such person; and an execution may issue for the collection of the same."

Although these procedures have been defined as criminal in nature, they are preventative measures which the magistrates have authority to set in motion to restrain the defendant from the commission of an offense against the person or property of another, and not proceedings to try the person charged with the commission of a criminal offense. Quarterly Report of Attorney General, Volume 7, page 136, citing **Howard v. State**, 121, Ala. 21, 25 So. 1000.

The above opinion of this office advises that an officer of the court is not entitled to file claim against the fine and forfeiture fund of the county for fees arising from peace proceedings under the above cited statutes, for the reason that a claim against the fine and forfeiture fund must be based upon costs accruing from the prosecution of an offense for which punishment may be inflicted and does not include a claim for costs arising from proceedings which in their nature are to restrain the commission of an offense.

In another opinion of this office found in Quarterly Report of Attorney General, Volume 20, page 12, in treating of peace proceedings it is pointed out that where complaint against a person is made under the statutes relating to these proceedings and warrant is issued for his arrest and he is subsequently required to give security to keep the peace, the costs of the proceeding or any part thereof, may be ordered by the magistrate to be paid by the person so restrained and an execution may issue against him for the collection of these costs. This opinion concludes with a statement that if no such order as to costs is made there is no provision of law authorizing payment of same.

In view of the above, I am of the opinion that you would not be entitled to claim of your county governing body costs incurred by you in the re-

moval of a person from another county on a peace proceeding warrant. In my judgment the county is not involved in this proceeding as there is no criminal offense involved and, consequently, there is no basis for any claim being made upon the county for payment of the costs involved. These costs, I believe, should be taxed in accordance with Sections 407 and 412, supra.

Very truly yours,

MacDONALD GALLION
Attorney General

February 8, 1960

Honorable E. S. Tunstall
Tax Assessor
Baldwin County
Bay Minette, Alabama

Ad Valorem Taxes—Cemeteries—Taxation.

Cemeteries are exempt from ad valorem taxation.

Opinion by Assistant Attorney General Tiller

Dear Sir:

This will acknowledge receipt of your letter of January 18, 1960, in which you request a formal opinion of this office as follows:

"Please give me an opinion relative to taxes on cemetery lots. Fairhope Memory Gardens is a corporation selling these lots at a profit and I would like to know if the Corporation should not have to pay ad valorem taxes."

You would like to know whether or not the Fairhope Memory Gardens, a corporation, engaged in selling cemetery lots, should be required to pay ad valorem taxes. We must answer your question in the negative. The corporation's right to the exemption is found primarily in Section 91 of the Constitution of Alabama of 1901. This section provides, so far as material, as follows:

"The Legislature shall not tax the property, real or personal, of the State, Counties, or other municipal corporations, or cemeteries, . . ."

The cemetery lots of this corporation come clearly within the purview of said Constitutional Section and are, therefore, exempt from ad valorem taxation.

We might add that this property of said corporation also comes within the protective folds of Title 51, Section 2 (a), Code of Alabama 1940, which section, so far as here pertinent, provides as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: . . . . all cemeteries . . ."

Very truly yours,

MacDONALD GALLION
Attorney General

February 12, 1960

Honorable Lon Dick
Tax Assessor
Clay County
Ashland, Alabama

Ad valorem Taxes—Exemptions—Veterans

To be entitled to the ad valorem tax exemption provided in Title 51, Section 2 (p), as amended, Code of Alabama 1940, a veteran must have been rated totally and permanently disabled by reason of insanity in accordance with the provisions of Title 51, Section 1 (k), Code of Alabama 1940.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of January 18, 1960, is as follows:

"We would like your opinion as soon as possible regarding the following:

"Act No. 115, as amended, Section 2, Title 51 of the Code of Alabama 1940, states (p) The property of all incompetent veterans to the value of three thousand dollars shall be exempt from ad valorem taxation.

"A veteran of World War II who is paralyzed as a result of poliomyelitis suffered 2 or 3 years after his discharge from service, has 100% non-service connected disability. Would he be exempt from ad valorem taxes?

"Does incompetent, as used in this section, mean physical or mental inability?"

You desire to know: Whether or not said veteran should "be exempt from ad valorem taxes," and "does incompetent as used in this section mean physical or mental inability." You tie in Title 51, Section 2 (p), as amended, Code of Alabama 1940, with these questions. Said subsection (p) provides:

"The property of all incompetent veterans to the value of $3,000.00 shall be exempt from ad valorem taxation." Is the veteran in question entitled to this exemption from ad valorem taxation? It is well here to note that statutes creating an exemption from taxation must be strictly construed. In this connection, see the case of State v. Wright, 224 Ala. 357, 140 So. 584, where the Supreme Court of Alabama stated the rule as follows:

"It is a well-settled rule of statutory interpretation, that provisions for exemption from taxation must be construed strictissimi juris, and claims of exemption not clearly within the import of the language of the statute must be rejected." (Citing cases)

Furthermore, the Legislature in their wisdom have seen fit to tie in Title 51, Section 1 (k), Code of Alabama 1940, with said subsection (p) by the use of a common term "incompetent veteran." Said Section reads as follows:

"The term incompetent veteran as used in this title shall be construed to mean any veteran who has been rated totally and permanently disabled by reason of insanity by the veterans bureau and for whom a guardian has been appointed under the provisions of Chapter 8 of Title 21."

It will be observed that for Section 2 (p) to come within the influence of Section 1 (k), the veteran must show that he has been "rated totally and permanently disabled by reason of insanity by the veterans bureau and for whom a guardian has been appointed under the provisions of Chapter 8 of Title 21." Based on the facts stated, the veteran has not shown the existence of these essential conditions precedent, one of these essentials being that he must have been rated totally and permanently disabled by reason of insanity by the veterans bureau and that a guardian has been appointed under the provisions of Chapter 8 of Title 21, none of which apparently has been done. It is, therefore, my opinion that the property of the veteran in question is not exempt from ad valorem taxes.

In answer to your second question, it is my opinion that in view of the provisions of Section 1 (k), supra, the term "incompetent" as used in Section 2 (p), supra, means mental rather than physical inability.

Very truly yours,

MacDONALD GALLION
Attorney General

March 7, 1960

Honorable Reo Kirkland
Judge of Probate
Escambia County
Brewton, Alabama

Counties—Funds—Driver's License.

1. Money accruing to the county under the provisions of Title 36, Section 61, Code of Alabama 1940, as last amended by Act No. 43, Acts of 1955, page 260, from applications for driver's licenses and issuance of temporary instruction permits may only be used for the purpose stated in Amendment No. 93 to the Constitution of Alabama 1901, as implemented by Act No. 50, First Special Session 1959, and such other local legislation as might be applicable to the county in question.

2. Funds accruing to the county from these sources must be maintained separate and apart from other non-earmarked funds of the county and should be maintained in the manner prescribed by the Department of Examiners of Public Accounts.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion of this office under date of January 6, 1960 is as follows:

"I would like to have your opinion as to proper fund to remit into the three-fifth of the twenty-five cents retained by the Judge of Probate under Section 61, Title 36, Code of Alabama, 1940 as amended. Should it be remitted into the General Fund of the County as expressedly set

out in said Section 61, or not? If not what fund should it be remitted into?

"I would also like to have your opinion as to use to which these funds may be applied by the County. Can they be used as general funds by County as indicated by Section 61, Title 36, Code of Alabama 1940 or does Constitutional Amendment Number 93 limit their use. Does the word 'Operation' in said Amendment Number 93 include fees paid for licenses of drivers.

"Please consider Section 61, Title 36, Code of Alabama 1940 as amended by Act No. 485, General Acts of 1951, page 868; Act. No. 585, General Acts of 1953, page 828; Act No. 43, General Acts of 1955, page 260 as related to Amendment 93 to Constitution of 1901, and other pertinent material."

Your request for an opinion sets some three inquiries which, for the purpose of clarity, I shall answer in inverse order.

First, the statutes with which we are here concerned are those relating to driver's licenses and issuance of temporary instruction permits. The first of these is found in Title 36, Section 59, Code of Alabama 1940, as amended, while the latter is set out in Title 36, Section 64, Code of Alabama 1940, as amended. Under these statutes persons may make application for a license to operate a motor vehicle or may have issued to them, subject to conditions there set out, a temporary instruction permit. It is the revenue accruing to the county from these two sources of which you make inquiry.

In my opinion, revenue accruing from either of the above sources does fall within the purview of Amendment 93 to the Constitution of Alabama 1901, as proposed by Act No. 755, Acts of 1951, page 1305 and subsequently proclaimed ratified as of November 19, 1952. This particular Constitutional Amendment is as follows:

"No moneys derived from any fees, excises or license taxes, levied by the state, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived from any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulations, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this amendment shall not apply to any such fees, excises, or license taxes now levied by the state for school purposes for the whole state or for any county or city board of education therein."

In my opinion the term "operation" as used within the above quoted amendment includes within its scope and effect both driver licensing and the issuance of temporary instruction permits which we here consider.

Having concluded that the particular matters inquired of by you do fall within the purview of Amendment 93, supra, I turn next to your question as to the uses which may be made of the money accruing to the county from these sources. As you are perhaps aware, under former opinion of this office found in Quarterly Report of Attorney General, volume 87, page 26, it was held that the above mentioned Amendment 93 was not self-executing but was a mere limitation on the use which the Legislature might authorize to be made of the money derived from the sources specified, and, thereby, required the enactment of further enabling legislation to implement such amendment. Under such holding no use might properly have been made of these funds in the absence of such enabling legislation. However, this situation has now been changed through the passage of Act No. 50, First Special Session 1959, which Act was approved February 24, 1959. Act No. 50, supra, provides that:

"Section 1. The several counties of the State are hereby authorized to expend the funds derived from fees, excises, or licenses taxes, levied by the State, relating to the registration, operation, or use of motor vehicles upon the public highways, and also the money derived from any fees, excises, or license taxes, levied by the State, relating to fuels used for propelling such vehicles, for the cost of constructing, reconstructing, maintaining, and repairing of public roads and bridges.

"Section 2. It is the intention of the Legislature by the passage of this Act to implement the provisions of Amendment 93 to the Constitution of Alabama 1901."

In my opinion, since the passage of Act No. 50, supra, the several counties of this State are authorized to make such use of the funds here in question as are authorized by this Act and by any local legislation pertaining to their particular county which might extend such provisions to traffic control or regulation.

I consider lastly your question as to the fund of the county to which you should remit the county's portion of the revenue arising from these sources. In my opinion, this is a matter of bookkeeping which could best be determined by the State Department of Examiners of Public Accounts. As I have noted above, the provisions of Amendment 93, supra, impose a limitation upon the uses which the legislature may authorize to be made of the funds arising from the sources mentioned by the amendment. Likewise, as I have noted, these limitations have application to the funds mentioned by your inquiry. Subsequently, this amendment has been implemented by Act No. 50, supra, which again prescribes the use which may be made of these funds. Both the constitutional amendment and the implementing statute serve as limitations upon the use of this money.

I am informed that under date of November 13, 1952 the Department of Examiners of Public Accounts published a memorandum addressed to all Judges of Probate, License Commissioners, County Treasurers and Budget Clerks wherein it was pointed out that, as of the date Amendment 93, supra, was proclaimed ratified and adopted by the Governor, certain changes would be necessary in the handling of those funds falling within the scope of such Amendment. This memorandum particularly mentioned driver's licenses and learner's permits and stated:

> "* * * When remittance of the county's portion of the revenue from this source is made to the county after the end of the month, all revenue derived prior to the date of the proclamation accrues to the county's General Fund and all revenue derived on the date of the proclamation and subsequent thereto accrues to the county's Public Highway and Traffic Fund."

In my opinion, you should adhere to this requirement on the part of the Department of Examiners of Public Accounts. Even though Title 36, Section 61, as last amended by Act No. 43, Acts of 1955, page 260, does provide that the county's portion of such revenue shall be paid into the general fund of the county I do not feel that such is sufficient to override or supersede the provisions of Amendment 93, supra, as implemented by Act No. 50, supra. As I have noted, the limitations of such amendment, and implementing legislation, are directed toward the use which may be made of these funds and not the method by which they shall be maintained by the county. Even though they were paid into the General Fund of the County they still could not be used for purposes other than those set out in the amendment and its implementing legislation. This would necessitate the maintenance of some special fund or account within your general fund and, in my opinion, such requirement has been met through the establishment of a Public Highway and Traffic Fund, as directed by the Department of Examiners of Public Accounts. In whatever manner such funds are maintained they can only be used for the purposes stated in the amendment and the implementing legislation and, in my judgment, your county should continue to maintain the Public Highway and Traffic Fund as you have been directed to do, and you should pay into this fund the county's portion of the revenue derived through the issuance of driver's licenses and temporary instruction permits.

Very truly yours,

MacDONALD GALLION
Attorney General

Mrch 9, 1960

Honorable Dan Rutledge
Chairman
Board of Equalization
Gadsden, Alabama

Boards of Equalization.

1. Under Title 51, Section 102, Code of Alabama 1940, the several Boards of Equalization in this State have been given the authority to make the policy and rules (where not inconsistent with the law) governing themselves and their functions, and such authority is vested in them as a Board.

2. The 1947 amendment adding subsection (D) to Section 94, as amended, Title 51, Code of Alabama 1940, which makes the Chairman of the Board the executive officer, and which provides that he shall supervise the assignment of duties to members and employees, has not changed the authority of the Board to make the policy and the rules.

3. The authority to place the clerical staff is included within the powers of the Chairman to act as the executive officer, and to supervise the assignment of duties to members of the Board and to employees.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of March 7, 1960, is as follows:

"Does the Chairman of the Board of Equalization have authority to place the clerical staff in the position that he deems best for the Board's operation or shall clerical placement be on a basis of the opinion of a majority of the Board?"

In order to answer your question it is necessary to consider at least to some extent the historical background of some of the present statutes which relate to Boards of Equalization; and which are to be found in Title 51, Chapter 9, Code of Alabama 1940, as amended.

Section 102 of Title 51, Code of Alabama 1940, now reads, and has read since its incorporation in the 1940 Code as follows:

"It shall be the duty of the members of the board of equalization at the first meeting held after January first in each year to select one of its members to act as chairman of the board of equalization for the ensuing year and to make such rules and regulations as may be necessary to carry out the provisions of this chapter as to the assessment and valuation of property for taxation. The board of equalization shall have authority at any time to make such rules and regulations as it may deem necessary to carry out the provisions of this chapter not in conflict with the provisions hereof." (Emphasis supplied.)

However, subsection (D) of Section 94 of Title 51, as that subsection was by amendment made a part of Section 94 by Act No. 560 of the Regular Session of 1947, appears to have had the effect of amending and superceding some of the provisions of Sections 102, supra. This applies particularly to the procedure to be followed in appointing the Board, and in regard to certain of the duties of the Chairman of the Board.

The changes referred to become apparent when we read subsection (D) of Section 94, as amended, supra:

"The commissioner of the state department of revenue with the approval of the governor shall on the first day of each January designate one member of each of the boards of equalization of the several counties of the state to act as chairman, and such chairman shall be the executive officer of the board and shall supervise the assignment of duties to members and employees." (Emphasis supplied.)

Thus, the chairman is now appointed by the Commissioner of Revenue with the approval of the Governor. He is the executive officer of the board and is to supervise the assignment of duties to members and employees.

The authority to place the clerical staff appears to clearly be included within the powers given the Chairman under subsection (D) of Section 94, as amended, supra, as the executive officer of the board, and to supervise the assignment of duties to the members of the board and to the employees. Your inquiry then is answered accordingly.

Very truly yours,

MacDONALD GALLION
Attorney General

March 11, 1960

Honorable Earle C. Moody
Mayor
City of Dothan
Dothan, Alabama

Sales Tax—Municipalities.

Under Act No. 100, Second Special Session 1959, effective October 1, 1959, municipalities are not required to collect sales tax on receipts from municipally operated recreational facilities.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of January 11, 1960, is as follows:

"Please advise whether Act No. 100 adopted by the second Special Session of the 1959 Legislature cancels the exemption from State Sales Tax on municipally operated recreational facilities provided for in Act No. 852 adopted by the Legislature and approved September 19, 1953."

It is my opinion that Act No. 100, Second Special Session 1959, effective October 1, 1959, does not cancel the "exemption" from State sales tax for municipally operated recreational facilities.

It is true that Act No. 100, supra, does not expressly re-enact, as a part thereof, Act No. 852, Regular Session of the Legislature 1953. In fact, it is my opinion that Act No. 852, supra, is expressly repealed by Act No. 100, supra, in view of the following language contained in Section 35 thereof:

"This Act supersedes Article 10 of Chapter 20, Title 51. Code of Alabama 1940, and all acts amendatory thereof or supplemental thereto, and such statutes are hereby repealed. . . ."

However, Section 2(b) of Act No. 100, supra, (which is the levying section here in question) is, word for word, a reenactment of Section 753(b), as amended, Title 51, Code of Alabama 1940 (the pertinent levying section under the old sales tax law). The Supreme Court of Alabama in **City of Anniston v. State of Alabama**, 265 Ala. 303, 91 So. 2d 211, in construing former Section 753(b), supra, held that the City of Anniston is not required to collect sales tax from customers using that city's three swimming pools and golf course, because municipalities were not specifically covered by the language used in Section 753(b), supra.

This being the law in Alabama prior to the enactment of Act No. 852, supra, and Section 2(b), Act No. 100, supra, being the same as the old Section 753(b), supra, it is my opinion that municipalities are not covered by Act No. 100, Section 2(b), supra, and are, therefore, not liable for the collection or payment of sales tax on fees paid by participants in recreational or athletic activities offered by municipally operated swimming pools, golf courses, parks, or other places of amusement or entertainment, with the exception of athletic contests conducted by or under the auspices of any educational institution within this state or any athletic association thereof, or other association whether such institution or association be a denominational, a state, or county, or a municipal institution or association or a state, county, or city school or other institution, association or school.

Very truly yours,

MacDONALD GALLION
Attorney General

March 15, 1960

Honorable John Watkins
Legal Counsel
Alabama League of Municipalities
Montgomery, Alabama

Agriculture and Industries—Farmers—Municipalities.

Where a nursery sells nursery stock some of which is produced by it and some of which is purchased for resale, the amount charged for a municipal privilege license, determined by gross receipts, levied on such nursery may not be based upon the gross sales of that nursery stock produced by the nursery.

Opinion by Assistant Attorney General Gish

Dear Sir:

Your request for an official opinion, bearing date of February 23, 1960, is as follows:

"In behalf of the cities and towns of Alabama, we respectfully request your official opinion upon the following question:

"Many of our municipalities levy license taxes in the nature of a sales tax, the amount of the levy being determined by a percentage of gross

sales. In several of these municipalities there are nurseries selling nursery stock, some of which is produced by the nursery and some of which is purchased by the nursery for resale. In the light of Title 37, Section 758, Code of Alabama 1940, may the municipality require such nurseries to pay the license based upon gross sales of all nursery stock, or must the municipality limit its license upon such nurseries to an amount based upon stock purchased and resold?

"Your official opinion upon this question will afford protection to our municipal officials in the administration of their license taxes and will be gratefully appreciated."

Title 37, Section 758, Code of Alabama 1940, reads as follows:

"§ 758. NO LICENSE FOR FARM PRODUCTS CHARGED TO FARMERS.—It shall be unlawful for any municipality to charge the farmers or others engaged in the production of farm products of whatever nature, any license or fee, for the sale or other disposition of said articles produced by them, at any place."

The language of Section 758, supra, is very broad in that it prevents municipalities from imposing a license upon anyone for the sale of any farm products produced by him. Cf. Quarterly Report of Attorney General, Vol. 37, page 62.

This office has held that nursery products are farm products within the meaning of Section 758, (Section 2171, 1923 Code), supra. Biennial Report of Attorney General, 1932-34, page 123.

Of course, a municipality may levy a privilege license on nurseries selling nursery stock which has been purchased for resale and may base the amount charged for such license on the gross receipts obtained from the sale of such stock. However, to hold that the amount of such license may be based upon gross receipts obtained from nursery stock produced by the nursery as well as that purchased for resale would violate the intent of the legislature as expressed in Section 758, supra.

Therefore, I am of the opinion that a municipality must base the amount of such license upon gross receipts obtained by a nursery from the sale of products other than nursery stock produced by it.

Very truly yours,

MacDONALD GALLION
Attorney General

March 18, 1960

Mrs. Louise S. Champion
Tax Assessor
Montgomery County
Montgomery 4, Alabama

Taxation—Motor Vehicles—Ad Valorem Taxes—Tax Assessors

1. The primary purpose of Act No. 654 of the 1959 Regular Session of the Legislature, approved November 25, 1959, effective October 1, 1960, is to place the burden on the owner of a motor vehicle to prove to the tax assessor, where such vehicle is brought into the State from another state, or is sold out of a dealer's inventories in this State, during the tax year, that the owner of the vehicle is entitled to the so-called exemption from the payment of ad valorem taxes on such vehicle the following October first.

2. Under Act No. 654, supra, and where a motor vehicle is brought into the State at any time during the tax year, if the owner furnishes to the Tax Assessor the certificate provided by the Act showing that the vehicle was registered in another state after the preceding October, then no ad valorem taxes would be due to be paid on such vehicle on the following October first.

3. If the certificate required by Act No. 654, supra, in such cases, is not furnished the tax assessor, then the Act provides that if the motor vehicle involved is brought into the State at any time during the tax year, then it shall be subject to taxation, the same as if it were held or owned in this State on the first day of October (the law day), and in such cases the tax would be due and payable on the following October first.

4. The same principles would for all practical purposes also apply as to motor vehicles sold from dealers' inventories in this State, and where a motor vehicle is sold in this State. In such cases the owner of the vehicle would have to furnish proper proof to the tax assessor as to the date of purchase of the vehicle as required by the statute in order to be entitled to the so-called exemption on the following October first.

5. All opinions of this office or parts thereof insofar as they are in conflict with this opinion are hereby expressly over-ruled as of October 1, 1960, the effective date of Act No. 654, supra.

Opinion by Assistant Attorney General Burton

Dear Mrs. Champion:

Your request for an official opinion bearing date of February 9, 1960, is as follows:

"Will you please give me your opinion on the new Act-654, recently passed pertaining to ad valorem tax on motor vehicles.

"The part that I am most concerned about is: A car bought new in March 1960, would this vehicle be taxable October 1, 1960, or October 1, 1961?

"I will appreciate your opinion at a very early date."

You have also requested orally over the telephone that I add to your said inquiry the following question which also arises under Act No. 654, Acts of Alabama 1959, approved November 21, 1959, effective October 1, 1960:

"Has Act No. 654, supra, changed the provisions of Title 51, Section 704, as amended, Code of Alabama 1940 insofar as they relate to cars which are brought into the State from another state during a tax year?"

In the beginning I believe that it should be stated that Act No. 654, supra, does not become effective until October 1, 1960, and until the tax year beginning October 1, 1960, and ending September 30, 1961. It must be remembered then that the provisions of the Act will not be applicable until that time.

Title 51, Section 704, Code of Alabama 1940, as amended by Act No. 654, supra, is a specific statute relating especially to the assessment and collection of the ad valorem tax on motor vehicles. Where Section 704, as amended, supra, is in conflict with the general laws pertaining to the same subject, then it supercedes the general laws, to the extent of there being a conflict. **State v. Elliott**, 246 Ala. 439, 21 So. 2d 310; **Downing v. City of Russellville**, 241 Ala. 494, 3 So. 2d 34; and **Herring v. Griffin**, 211 Ala. 225, 100 So. 202.

The law day for the assessment of State and County taxes on all property including personal property in this State, generally speaking, is October first, at the beginning of the tax year, but these taxes do not become due and payable until the following October first, and at the end of the tax year. The tax then is payable for the preceding tax year. **Johnson v. State**, 245 Ala. 499, 17 So. 2d 662; Quarterly Report of the Attorney General, Volume 85, page 11; Quarterly Report of the Attorney General, Volume 81, page 73; Quarterly Report of the Attorney General, Volume 76, page 58; and Quarterly Report of the Attorney General, Volume 19, page 167.

In the case of personal property other than motor vehicles brought into the State, Title 51, Section 21(m), Code of Alabama 1940, extends the law day, where it is brought into the State after October first and before the Tax

Assessor completes his assessment (the last Monday in February), from October first to and including the last Monday in February. In such cases personal property is subject to taxation the same as if it had been held or owned in this State on the first day of October; but the tax does not become due until the following October first, at the end of the tax year. In regard to motor vehicles which are brought into the State, Title 51, Section 704, as amended, Code of Alabama 1940, contained an identical provision prior to subsection (c) of that Section having been amended by Act No. 654, supra, in 1959. In this respect, however, subsection (c) of Section 704, as amended, supra, and before being amended in 1959, merely reiterated as far as motor vehicles are concerned the rule which was and is still contained in subsection (m) of Section 21, supra.

Subsection (c) of Title 51, Section 704, as amended, Code of Alabama 1940, as that subsection was amended and rewritten by Act No. 654, supra, provides, as follows:

"Motor vehicles brought into the State during any tax year shall be subject to taxation, the same as if they had been held or owned in the State on the 1st day of October. Every motor vehicle shall be presumed to have been in Alabama during the taxable year and taxes thereon shall be assessed unless the person, firm or association or corporation applying for exemption from ad valorem taxation furnish the tax assessor with a certificate showing that such vehicle was registered in another state after the preceding October, such certificate to be signed by the proper ficial of such State and also an affidavit signed by the person, or in the case of firm, association, or corporation, its authorized agent, claiming the exemption, stating the exact date the car came into Alabama; provided however, that where application is made for exemption from taxation on a new motor vehicle for which there has never been a tag purchased, a bona fide bill of sale showing the date of purchase shall be sufficient proof for exemption by the tax assessor provided the date of purchase, the name and address of the dealer and the invoice number is shown on the assessment sheet. The department of revenue shall furnish each tax assessor with blank certificates required by this section for claiming exemptions." (Emphasis supplied.)

Act No. 654, supra, then has substantially changed the language of Subsection (c) of Section 704, as amended, supra, and the requirements generally speaking under the statute. Subsection (c) of Section 704, supra, as amended by Act 654, now expressly provides insofar as it relates to motor vehicles which are brought into the State, that where a vehicle is brought into the State at any time during the tax year (October 1 through September 30), it shall be subject to taxation the same as if it had been held or owned in Alabama on the law day, the first day of October. This is said to be applicable unless the owner of such vehicle furnishes the tax assessor with the prescribed certificate in applying for exemption on the following October 1, showing that the vehicle was properly registered in another state after the preceding October.

Act No. 654, has also served to give a somewhat different meaning than that previously ascribed to the last sentence of Section 704, supra, which concerns dealers' inventories, and motor vehicles which are purchased in this State from such inventories during the tax year. Under the Act, if a motor vehicle is a part of a motor vehicle dealer's stock of goods and inventories at any time during the tax year, it is included in the dealer's average inventories for ad valorem tax purposes for that tax year, and is not to be subject to the tax under Section 704, as amended, supra, as a motor vehicle. In order to be entitled to the exemption in this connection on the following October 1, the owner of the vehicle in applying for the exemption must furnish to the tax assessor satisfactory proof of the date of purchase of the motor vehicle.

With this as a background, your questions are answered in the order which you asked them, as follows:

1. In giving consideration to your first question and where a motor vehicle is purchased in this State from the stock and inventories of a motor vehicle dealer at any time during the tax year (October 1 through September 30) then under the provisions of Act No. 654, supra, and Section 704, as amended, such vehicle would not be subject to ad valorem taxes as a motor vehicle for said tax year, but would be included as a part of the dealer's average inventories for the purpose of the ad valorem tax on his stock of goods and inventories for that year. This would be true regardless of when the car was purchased during the tax year from a dealer in this State, and whether the car was so purchased before or after the last Monday in February. In fact, under said Act and amendment to Section 704, supra, the last Monday in February would cease to have any significance at all insofar as the tax is levied on motor vehicles. Section 704, as so amended, supra, supercedes entirely the general laws pertaining to ad valorem taxes in this respect.

Where the foregoing circumstances are present, then there would be no ad valorem tax due on the motor vehicle as such under Section 704, as amended, supra, on October 1, immediately following the tax year in which the car was purchased from the dealer, provided that the owner of the motor vehicle can furnish to the tax assessor proper proof as to the date the car was purchased during the tax year. In this respect the Act provides that a bona fide bill of sale showing the date of purchase shall be sufficient proof for exemption by the tax assessor provided the date of purchase, the name and address of the dealer and the invoice number is shown on the assessment sheet. If no such proof is furnished by the owner of the vehicle, then the Act would not authorize the tax assessor to allow the exemption and requires him to assess the vehicle for the tax for that tax year, and the tax will be due on October 1, at the end of the tax year.

In a general way this answers your first question. The dates, however, specified by you cannot be used because, as I have heretofore stated, the Act does not become effective until October 1, 1960, and beginning with the tax year commencing on October 1, 1960, and ending September 30, 1961.

2. Your second question is answered to the effect that Act No. 654, supra, has also changed the previous requirements and rulings made under Section 704, as amended, supra, relating to motor vehicles brought into this State from another state during a tax year by extending the law day to now include the entire tax year.

In this respect the Act provides that a motor vehicle will be subject to the tax if brought into the State at any time during the tax year, the same as if it had been owned or held in Alabama on the law day (the first day of October), unless the owner of the vehicle and person applying for exemption on the following October 1, furnishes the tax assessor with the prescribed certificate showing that such vehicle was registered in another state after the preceding October. If a certificate as required by the statute is furnished the tax assessor when the owner of the vehicle applies for the exemption then the tax assessor is authorized to allow the exemption and no ad valorem tax would be due on the motor vehicle on October 1, at the end of the tax year. This would apply regardless of when the vehicle was brought into the state during the tax year. The last Monday in February is no longer to have any bearing or significance in this respect. If such certificate is not furnished, then the tax assessor cannot allow the exemption, and must assess the vehicle, and the tax will be due on October 1, at the end of the tax year.

Act No. 654, supra, has made it the duty of the State Revenue Department to furnish each tax assessor with blank certificates required by the Act and by Section 704, as amended, supra, as to the taxpayer proving his right to the so-called exemptions whether relating to motor vehicles sold out of dealers' inventories or brought into the State from another state.

These forms or blank certificates should prove helpful in this respect to both the taxpayer and to the several tax assessors.

When Act No. 654, supra, becomes effective on October 1, 1960, this opinion will supercede and overrule all opinions or parts thereof insofar as they are in conflict herewith.

Very truly yours,

MacDONALD GALLION
Attorney General

March 22, 1960

Honorable John A. Sankey
Judge of Probate
Montgomery County
Montgomery, Alabama

Taxation—Licenses—Refunds—Veterans—Exemptions.

1. In claiming refund of license taxes paid, veteran may show entitlement to exemption allowance although said veteran's exemption not claimed at time license obtained.

2. Where total amount of license taxes collected for both state and county are distributed equally to the state and county, refund of said license taxes so collected and distributed are likewise remitted or refunded equally by said state and county.

Opinion by Assistant Attorney General Payne.

Dear Sir:

Your request for an official opinion bearing date of February 15, 1960, is as follows:

"A question has arisen concerning the amount of exemption to veterans allowed on privilege licenses under Title 51, Section 831(1), as amended, Acts of 1955.

"A veteran has applied for an auctioneer's license (Title 51, Section 461, Code of Alabama 1940), the total amount of which is $75.00. Under Title 51, Section 831 C, it states that the amount to the State is a certain amount, and the County is allowed to collect 50%, and we would charge $50.00 for the State and $25.00 for the County, which totals $75.00.

"Under Title 51, Section 864(2) and (3) of the veterans exemption law, a veteran is entitled to a $35.00 State and $35.00 County exemption. We have been under the impression that on this license we would allow him $35.00 exemption on the State and only $25.00 on the County, since that is the total amount in the County column.

"Title 51, Section 831(1), Code 1940, Acts of 1955, amended the distribution of money collected on privilege licenses from 2/3-1/3 to a 50-50 distribution, State and County. The question between the State Revenue Department and my office concerns the exemption under the amended Section, and whether or not we are correct in allowing an exemption of only $60.00, which would be $35.00 to the State and $25.00 to the County.

"Please give me your formal opinion as to whether a veteran who is legally entitled to an exemption should be allowed an exemption on this license, or any license where a similar question is applicable, figured on a levying basis of 2/3-1/3 or on a 50-50 distribution basis under the amended Section above.

"Your prompt reply will be appreciated, since we are holding a refund pending your decision."

I assume that the petition for refund you are holding was filed by the veteran in question under authority of Title 51, Sections 848 and 849, as amended, Code of Alabama 1940. The fact that you are now holding the petition for refund indicates that the veteran through inadvertence failed to claim his exemption at the time of purchase of the license that would have allowed him an amount not exceeding $35.00 each toward payment of state and county licenses under Title 51, Sections 864(2) and (3) respectively. This fact raises the preliminary question as to whether or not, under such circumstances, the veteran would be entitled to a refund under the provisions of Title 51, Sections 848 and 849, as amended, Code of Alabama 1940.

It is the rule, under ordinary circumstances, that for one to be entitled to a claim of exemption from taxes, that the exemption must be claimed seasonably. This, as I have stated, is the general rule and applies especially to cases involving exemptions from **ad valorem taxes.** It has been repeatedly held that due to the nature of the levy and collection of ad valorem taxes, exemption therefrom must be claimed before the third Monday in January of the current tax year. See Quarterly Reports of the Attorney General, Vol. 77, page 43. The fact at issue here, however, is whether or not the veteran in question has paid to the state and county a license fee for an auctioneer's license under Title 51, Section 461, Code of Alabama 1940, through a mistake of fact or law within the contemplation of Section 848, **supra,** or has paid an amount in excess of that required.

The veteran is claiming a refund involving a **license tax** under Section 848, **supra.** This section in part reads as follows:

"Any person who by a mistake of **fact or law** has paid to the judge of probate or the commissioner of licenses money that was not due from him for a licsense, or an amount in excess of that required by law for the business or occupation to be carried on by such person under the license, ..." (Emphasis supplied)

The above refund statute unquestionably was not intended to penalize, but on the contrary was enacted to afford some manner of relief and to alleviate conditions where a licensee has through inadvertence paid a license that was not in law due, or has paid to the proper authority an amount in excess of that actually due. It covers instances where an excess is paid for the license which would not have been paid had the person concerned been aware of his status at the time payment for the particular license is made. It is to be

noted that Section 848, supra, does not require payment "under protest." The facts necessarily implied from your request shows that the veteran at the time he applied for and obtained his auctioneer's license was entitled under the laws of Alabama to claim his veteran's allowance as provided by Sections 864 (2) and (3), supra, to reduce the amount of his license payment or to pay none at all depending upon the amount of the particular license.

The Alabama Supreme Court in the case of **State v. Woods**, 242 Ala. 184, 5 So. 2d 732 held that the statute imposing the vending machine license, Title 51, Section 613, Code of Alabama 1940 is to be construed in pari materia with our sales tax law "as important parts of the general system of the imposition of excise taxes." Therefore, in considering in general the licensing laws of the state together with those statutes allowing refund such as Section 848, supra, and those providing for veteran's exemptions from said licenses, these related statutes should likewise be construed in pari materia. I so construe them. It is a well-known cannon of statutory construction to the effect that that which is within the spirit of the law is within the letter. **City of Birmingham v. Southern Express Company**, 164 Ala. 529, 51, So. 159. **Cole v. Gullatt**, 241 Ala. 669, 4 So. 2d 412. In the Gullatt case, supra, the Supreme Court said:

> ". . . That where the terms of a statute do not indicate with reasonable certainty their intended application to particular cases, though their general intent and application are clear, they should be given such a construction as is conducive to fairness and justice and in harmony with the general spirit and policy of the statute, rather than one offensive thereto, if such construction is reasonably consistent with the language used. . . ." (Emphasis supplied)

In my opinion this veteran's application for refund, based upon his failure through inadvertence to claim his veteran's exemption at the time he applied for and obtained his auctioneer's license, squares with the spirit and the intent of Section 848, supra, and accordingly the refund is in line for payment. The veteran's exemption is personal to the veteran, and he should be allowed to claim it as long as he does so within two years from the date of payment of the license, as provided by Section 848, supra. I further conclude that a case such as has been presented by you should be liberally construed so as to conform with the spirit of the refund statute and the obvious purpose for which enacted. Exemptions involving different subjects of taxation are construed in accordance with the laws peculiar thereto. A license statute and a corresponding statute authorizing a refund of the license or part thereof is not one of the subjects that should bear a strict construction. This is illustrated in the opinion of this office contained in Vol. 77, page 43, supra, where it was observed at page 45:

> ". . . The opinions referred to in the foregoing paragraphs seem to clearly establish the proposition that all exemptions from ad valorem taxa-

tion must be applied for before the third Monday in January of the current tax year, and if they are not claimed within that time they are waived. The rules surrounding the levy of ad valorem taxes are of necessity more rigid and inflexible than those of excise and other taxes . . ." (Emphasis supplied)

Accordingly I am of the opinion that the veteran may show his entitlement to the veteran's exemption to the extent of $35.00 each toward payment of his state and county license, in applying for refund under Section 848, supra.

I turn now to other phases of your request. Assuming that the veteran has shown entitlement to the exemption claimed, he would be entitled to a refund of $35.00 on his state auctioneer's license, and inasmuch as the county license was only levied in the amount of $25.00, he would be entitled to a refund of this amount, making a total refund due of $60.00. The concern between your office and the State Department of Revenue seems to stem from the fact that although a state license of $50.00 and a county exaction of only $25.00 was paid, the total collected ($75.00) was distributed to the state and county on the basis of one-half to the state and one-half to the county.

This basis of distribution is authorized by Act No. 572, General Acts 1955, page 1248 (now codified as Title 51, Section 831 (1), Code of Alabama 1940). This act in substance provides that where there is levied both a state and a county license that of the total amount collected by the collecting authority for such state and county license "he shall distribute one-half thereof to the state, and one-half thereof to the county." I understand that the total amount of $75.00 collected by you was distributed in the foregoing manner, that is to say, $37.50 was received or went into state fund and $37.50 was received into the county fund. Such being the case, logic and reasoning compels the conclusion that if a refund is due on a portion of the amounts so distributed, that the remittance or refund by the respective treasuries of the state and county should be made on the same basis. Therefore, I am of the opinion that of the amount of $60.00 due to be refunded $30.00 should be refunded by the state and the amount of $30.00 is to be refunded by the county, "less the issuance fee and commission retained by the judge of probate or the commissioner of licenses." Section 848, supra.

The nature of your request has not been such that I have been able to answer your question in the affirmative or in the negative. The questions involved, however, have been discussed generally and answered in accordance with the above.

Very truly yours,

MacDONALD GALLION
Attorney General

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